No. 93-1286

In the Supreme Court of the United States

OCTOBER TERM, 1993

AMERICAN AIRLINES, INC., PETITIONER

v.

MYRON WOLENS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

STEPHEN H. KAPLAN
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

SAMUEL PODBERESKY
Assistant General Counsel for Aviation Enforcement and Proceedings
Department of Transportation
Washington, D.C. 20590

ROBERT V. ZENER
JONATHAN R. SIEGEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The United States will address the following question:

Whether respondents' claims under the Illinois Consumer Fraud and Deceptive Business Practices Act and for breach of contract under state common law, arising out of petitioner's changes to its frequent flyer program in 1988, are preempted by the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1).

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INTEREST OF THE UNITED STATES

Under the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. App. 1301 *et seq.*, the Department of Transportation (DOT) has broad authority to regulate certain aspects of the airline industry, including the authority to prevent, and to enter cease and desist orders barring, unfair and deceptive practices and unfair methods of competition. See 49 U.S.C. App. 1381(a). Congress mandated preemption of certain state laws under 49 U.S.C. App. 1305(a)(1) in order to prevent the States from impairing the federal deregulatory scheme and the ADA's goal of fostering competition, and to ensure uniformity of the remaining regulation of the airline industry. DOT has an interest in a sound application of Section 1305(a)(1) that protects both

the deregulatory, pro-competitive purposes of the ADA and the enforceability of private contracts, which are a key component of the deregulated, market-oriented airline system Congress sought to promote. DOT, like the Civil Aeronautics Board before it, has consistently recognized and relied upon the availability of state-court adjudication of contract claims in fulfilling the purposes of the ADA.

STATEMENT

1. Prior to 1978, the Federal Aviation Act of 1958 (FAA) gave the Civil Aeronautics Board (CAB) broad authority to regulate the interstate airline industry. Pub. L. No. 85-726, 72 Stat. 731. In 1978, however, Congress enacted the Airline Deregulation Act (ADA) to deregulate domestic air transport. Pub. L. No. 95-504, 92 Stat. 1705, codified at 49 U.S.C. App. 1301 *et seq.* The ADA was intended to create conditions for an economically stronger and more competitive domestic airline industry and to provide lower airfares and improved services to the traveling public. See *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2034 (1992). In furtherance of that goal, the ADA contains a preemption clause, 49 U.S.C. App. 1305(a)(1), which provides in relevant part:

> [N]o State * * * shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier.

The statutory mandate of the Department of Transportation, as the successor to the CAB,[1] includes "[t]he encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of

[1] The CAB's functions were phased out following 1978 until the CAB was abolished in 1985, and its authority was transferred to DOT. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 3, 98 Stat. 1706; 49 U.S.C. App. 1551.

air transportation services." 49 U.S.C. App. 1302(a)(9); see 49 U.S.C. App. 1302(a)(4) and (10). DOT retains the authority, however, to investigate unfair and deceptive practices or unfair methods of competition by an airline and to order the airline to cease and desist from such practices or methods of competition. 49 U.S.C. App. 1381(a); see *Morales*, 112 S. Ct. at 2040; *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 296-297, 300-303 (1976). Under that authority, DOT conducts an active enforcement and consumer protection program relating to the airline industry.[2] While DOT's enforcement actions thus afford consumers an important measure of protection, DOT does not have a comprehensive administrative apparatus for adjudicating all individual disputes arising under contracts between airlines and their passengers. Rather, DOT regulations explicitly and implicitly rely as well on informal measures and the availability of state courts for the resolution of such contract disputes. See pages 19, 25-27, *infra*.

2. a. Frequent flyer programs are airline promotional devices that were initiated in the immediate post-deregulation period—first by American Airlines in 1981, and thereafter by almost every other major airline. The programs operate by allowing a passenger to enroll as a member, earn flight mileage credits based on miles flown, and redeem those credits for free flights, class-of-service upgrades, or other benefits.[3]

Frequent flyer programs have become "one of the most effective marketing practices yet devised for differentiating airline services and appealing directly to the

[2] For example, in 1993 alone, DOT issued 34 cease and desist orders and assessed more than $1.8 million in civil penalties in aviation economic enforcement proceedings.

[3] See generally Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems* 32-35 (Feb. 1990) [hereinafter *Airline Marketing Practices*] (describing how frequent flyer programs operate).

traveller." *Airline Marketing Practices* at 31. They are targeted primarily toward airlines' most lucrative customers: full-fare business travelers who accumulate mileage on their paid business travel and use their mileage credits to obtain free vacation tickets they might not otherwise buy. The cost of the programs is minimized by funneling free trips to what would otherwise be excess capacity on scheduled flights. *Id.* at 31, 32, 39.

In order to minimize the cost of frequent flyer programs, however, "it is essential that there be minimum substitution between frequent flyer awards and airline services that would have been purchased in any case." *Airline Marketing Practices* at 32. Airlines therefore typically restrict the transferability of travel awards and place capacity controls on when they can be used. *Ibid.* As long as travelers using frequent flyer awards are not displacing full-fare business travelers—whether by taking up seats that could otherwise be sold, or by giving business travelers free tickets they would otherwise pay for—"many airline managers believe that their frequent flyer programs are essentially costless." *Id.* at 41.

b. As explained above, DOT's statutory mandate includes prevention of unfair and deceptive practices, and DOT is empowered to take administrative action against such practices. See 49 U.S.C. App. 1302(a)(7), 1381(a). That authority encompasses the power to regulate the type of misrepresentation alleged in respondents' claims under the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act), Ill. Comp. Stat. Ann. ch. 815, §§ 505/1 *et seq.* (Smith-Hurd 1993). Although DOT has relied on its authority under Section 1381(a) to prevent unfair and deceptive practices involving such programs on an informal basis, it thus far has chosen not to adopt regulations governing frequent flyer programs. A petition filed by the Association of Discount Travel Brokers in 1991 proposed that DOT adopt a rule to eliminate sales and transfer restrictions on frequent flyer awards, eliminate excessively restrictive capacity controls, eliminate

unreasonable blackout dates, and require specified advance notice to consumers of program changes. Five airlines, including American, opposed that petition. DOT denied the petition. See DOT Order Dismissing Complaint and Denying Petition for Rulemaking (May 29, 1992) [hereinafter DOT Order Denying Rulemaking] (Pet. App. 85a, 90a). DOT found that the requested rules were unwarranted because the brokers' association had failed to show "that the carriers' conduct misleads or is likely to mislead program members," *id.* at 97a, "that members are unaware that carriers reserve the right to change the terms of the programs or impose blackout dates or capacity limits," *ibid.*, or that carrier practices either amount to unfair methods of competition, *id.* at 98a, or "cause unwarranted consumer injury," *id.* at 100a.

3. a. In each of these two consolidated cases, respondents filed a class action against American Airlines in the Circuit Court for Cook County, Illinois. Pet. App. 48a-60a, 61a-73a. Respondents allege that they were members of American's frequent flyer program (AAdvantage) prior to May 18, 1988, *id.* at 49a, or at least prior to June 1, 1988, *id.* at 63a. They allege that, in order to accumulate mileage in the AAdvantage program, they used the services of American, even if more costly or less convenient than those of other airlines, and of hotels, car rental companies, and other companies participating in the program. *Id.* at 49a, 62a-63a. According to the complaints, on May 18 and June 1, 1988, American altered its program to the detriment of members who had accumulated mileage credits. *Id.* at 50a, 52a, 63a, 65a-66a. The challenged practices included:

- Additional blackout dates, during which awards may not be used for travel (*id.* at 52a, 65a)

- Capacity controls, *e.g.*, placing a 50 percent maximum on the number of available seats allocated to persons using free travel awards (*id.* at 50a, 52a, 56a, 65a, 66a)

- Changes in mileage credits required for first-class upgrades, and capacity controls on first-class upgrades (*id.* at 65a)

- Changes in the award structure such that, *e.g.*, tickets previously available for 50,000 mileage credits would be available for 60,000 credits for a restricted-use ticket, or 120,000 credits for a ticket valid at peak times and days (*id.* at 65a-66a)

- Reductions in the mileage credits earned per flight (*id.* at 52a, 66a)

Respondents allege that American's alteration of its program violated the Illinois Consumer Fraud Act and constituted a breach of contract. In their Consumer Fraud Act claims, respondents assert that American knowingly made false representations in its materials soliciting respondents to join AAdvantage, including by offering "Triple Mileage" credits at a time when American knew it was about to institute capacity controls. Pet. App. 56a, 70a. Although respondents acknowledge that American "reserved the right to restrict, suspend, or otherwise alter aspects of the Program," *id.* at 64a,[4] they claim that American fraudulently failed to notify them that it reserved the right to do so "retroactively" by altering or reducing the benefits available in exchange for mileage credits already earned, *id.* at 56a-57a, 70a.

Respondents' contract claims rest on allegations that American, through the AAdvantage program, made unilateral offers of specified benefits to respondents to

[4] The brochure explaining the AAdvantage program stated: "AAdvantage program rules, regulations, travel awards and special offers are subject to change without notice. American Airlines reserves the right to terminate the AAdvantage program at any time." American Airlines AAdvantage Program Brochure (4/87), *reproduced at* Supplemental Appendix to Brief of Plaintiffs-Appellees at SA8, *Wolens* v. *American Airlines, Inc.*, No. 89-918 (Ill. App. Ct. Dec. 12, 1990).

induce them to fly American and patronize other businesses affiliated with AAdvantage, and that each respondent "accepted by joining the Program, traveling on [American's] airline and/or using the facilities and services of other participants in the Program." Pet. App. 51a; see *id.* at 63a. When American reduced the value of the benefits earned through such acceptance, respondents allege, it breached their contracts. *Id.* at 52a, 63a, 66a.

Respondents sued on behalf of themselves and a class alleged to consist of millions of persons. Pet. App. 50a, 63a. They sought damages in the amount by which the value of the mileage credits they had earned was reduced by reason of the allegedly unlawful acts of American, plus punitive damages. Respondents also sought an injunction against application of any changes in the AAdvantage program in a manner that would affect mileage credits previously earned. *Id.* at 53a-55a, 57a-58a, 59a, 67a, 68a, 71a, 72a.

b. The trial court consolidated the cases, and American moved to dismiss, contending that the claims were preempted by Section 1305(a)(1). The court denied the motion to dismiss. Pet. App. 41a-45a. On interlocutory appeal, the Illinois Appellate Court held that Section 1305(a)(1) preempts the request for injunctive relief, but not the claim for damages for breach of contract and violation of the Illinois Consumer Fraud Act. Pet. App. 31a-40a. The Supreme Court of Illinois affirmed. *Id.* at 20a-30a.

c. While American's petition for a writ of certiorari was pending, this Court rendered its decision in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). *Morales* broadly interpreted the term "relating to" in the preemption clause of the ADA to apply to a State's enforcement of its consumer fraud laws "having a connection with" or making a "reference to" airline rates, routes, or services. 112 S. Ct. at 2037.

d. In light of *Morales*, this Court vacated the judgment of the Supreme Court of Illinois in this case, and remanded for further consideration. *American Airlines, Inc.* v. *Wolens*, 113 S. Ct. 32 (1992) (Pet. App. 19a). On re-

consideration, the Supreme Court of Illinois reinstated its prior judgment. Pet. App. 1a-16a. The damage claims at issue, the court held, do not "relate to the rates, routes, or services" of an airline because a frequent flyer program is not an "essential element" of airline operations. *Id.* at 6a. The court held that respondents' claims for money damages do not seek to establish the rates airlines must charge, the routes they must fly, nor the services they must provide. *Ibid.* Rather, their claims "bear[] only a tangential relation to airline rates, routes, and services," because "frequent flyer programs are peripheral to the operation of an airline." *Id.* at 6a-7a.

SUMMARY OF ARGUMENT

I. Respondents' Illinois Consumer Fraud Act claims are expressly preempted by 49 U.S.C. App. 1305(a)(1). The Court in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), read the phrase "relating to" in Section 1305(a)(1) broadly to encompass all laws having any direct or indirect "connection with" or "reference to" airline rates, routes, or services. Respondents' claims relate to rates and services as closely as did the claims preempted in *Morales*. First, the claims refer to "rates" American charges (in the form of mileage credits) for free tickets and upgrades, and they demand "services" in the form of access to flights and class-of-service upgrades without regard to capacity controls and blackout dates. Second, the claims relate to rates and services "as an economic matter." *Morales*, 112 S. Ct. at 2039. Imposition of advance notice requirements under the Illinois Consumer Fraud Act could limit American's ability to maximize its profits through sales of full-fare tickets while still offering valuable frequent flyer benefits to consumers. See *id.* at 2039-2040. The Supreme Court of Illinois erred in holding that respondents' damage claims are not preempted on the ground that frequent flyer programs are not "essential" to airline operations; even claims relating

to non-essential operations are preempted under *Morales* if they relate to rates, routes, or services.

II. Respondents' common-law contract claims are subject to a different analysis, because contract obligations arise from private parties' agreement to their own chosen terms, and thus do not amount to a State's "enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law" within the meaning of Section 1305(a)(1). Section 1305(a)(1) is intended to bar a State from adopting or implementing measures to enforce the public policy of the State affecting rates, routes, or services, not to bar a State from effectuating terms in a private contract voluntarily entered into by an airline and its customers.

References to "contract" and "agreements" in other sections of the FAA (as amended by the ADA) demonstrate that Congress recognized that the airline business would be governed in large part by private contract, and therefore undermine the notion that Congress intended to preempt all claims for breach of such contracts. The legislative history contains no indication that such claims are preempted, and DOT regulations and policy statements expressly contemplate that the thousands of minor disputes arising each year under passengers' contracts with airlines may be adjudicated under state law.

Effectuating private contracts also is consistent with the ADA's deregulatory purpose, because contracts do not substitute state policy decisions for airlines' business judgments, but are rather a key component of the deregulated market that the ADA was designed to encourage. Accordingly, state courts are not barred by Section 1305(a)(1) from adjudicating breach of contract claims—including those arising under a contract concerning frequent flyer benefits—to the extent the courts merely give effect to agreements between private parties and afford remedies for their breach. A State may not, however, impose its public policy on airline operations through the application of those aspects of its common law

of contracts (*e.g.*, the doctrine of unconscionability) that go beyond ascertaining and enforcing the private agreement between the parties. Respondents' contract claims should be remanded to the Supreme Court of Illinois for further proceedings under these principles.

ARGUMENT

I. SECTION 1305(a)(1) OF THE AIRLINE DEREGULATION ACT OF 1978 PREEMPTS RESPONDENTS' CLAIMS UNDER THE ILLINOIS CONSUMER FRAUD ACT

The Airline Deregulation Act of 1978 (ADA), in 49 U.S.C. 1305(a)(1), expressly preempts respondents' claims under the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act), Ill. Comp. Stat. Ann. ch. 815, §§ 505/1 *et seq.* (Smith-Hurd 1993). Those claims "relat[e] to rates, routes, or services" within the meaning of Section 1305(a)(1), as interpreted by this Court in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). The state statutory claims in this case challenge the adequacy of the prior notice American Airlines provided to consumers regarding changes the airline made in 1988 to its AAdvantage frequent flyer program. Like the claim in *Morales* challenging the adequacy of information provided in airfare advertising, respondents' consumer fraud claims have the prohibited "connection with" or "reference to" rates and services, and are therefore preempted.

A. This Court held in *Morales* that Section 1305(a)(1) of the ADA bars state enforcement actions challenging airline fare advertising under a state consumer fraud statute and a set of multi-state Travel Industry Enforcement Guidelines issued by the National Association of Attorneys General (NAAG). 112 S. Ct. at 2041. Trans World Airlines sought to enjoin the state of Texas from enforcing the NAAG guidelines through the Texas Deceptive Trade Practices-Consumer Protection Act

(Deceptive Trade Act), Tex. Bus. & Com. Code Ann. §§ 17.41 *et seq.* (Vernon 1987). See 112 S. Ct. at 2035. The guidelines required, among other things, that advertisements for fares make conspicuous disclosures of applicable restrictions, and that any advertised fare be available in sufficient quantity to meet reasonably foreseeable demand on all flights at all times. See *id.* at 2039.

The Court focused on the language in Section 1305(a)(1) that refers to state laws "relating to rates, routes, or services." The Court held that the term "relating to" in Section 1305(a)(1) should be read as broadly as the phrase "relate to" under the Employee Retirement Income Security Act of 1974 (ERISA), which expressly supersedes all laws "insofar as they * * * relate to any employee benefit plan." 29 U.S.C. 1144(a). See 112 S. Ct. at 2037. Guided by cases interpreting "relate to" under ERISA, the Court held that Section 1305(a)(1) preempts state enforcement of any action "having a connection with or reference to" rates, routes, or services. 112 S. Ct. at 2037. The Court noted that Section 1305(a)(1) is not limited to state laws "actually prescribing" rates, routes, or services, nor to laws addressed to the airline industry in particular, *id.* at 2037-2038, and that it preempts state laws without regard to whether their substantive requirements are consistent or inconsistent with those of the ADA, *id.* at 2038.

Applying these principles, the *Morales* Court found that the NAAG guidelines "relate[d] to" rates within the meaning of Section 1305(a)(1) in two ways. First, they "quite obviously" related to rates, because "[i]n its terms, every one of the guidelines * * * bears a 'reference to' air fares." 112 S. Ct. at 2039. Second, the guidelines related to rates "as an economic matter," because state restrictions on fare advertising "have the forbidden significant effect on fares." *Ibid.* The Court explained that "the obligations imposed by the guidelines would have a significant impact upon the airlines' ability to market their product, and

hence a significant impact upon the fares they charge." *Id.* at 2040.

The Court acknowledged that "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have a pre-emptive effect." 112 S. Ct. at 2040, quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983). Thus, state laws against gambling or prostitution as applied to airlines would not be preempted, nor would laws relating to certain non-price aspects of fare advertising, such as obscene depictions. 112 S. Ct. at 2040.

Finally, the Court stressed that under the federal regime enacted by Congress, the airlines do not have "*carte blanche* to lie and deceive consumers." 112 S. Ct. at 2040. The Court explained that DOT retains the power, under 49 U.S.C. App. 1381(a), to prohibit "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." See 112 S. Ct. at 2040.

B. The same two rationales supporting preemption of the claims in *Morales* require preemption of respondents' claims based on the Illinois Consumer Fraud Act. First, the claims "quite obviously" relate to rates and services because, as pleaded by the respondents, they expressly "bear[] a 'reference to'" rates and services. 112 S. Ct. at 2039. Respondents' complaints allege that American changed the rates at which it awarded frequent flyer tickets, and they challenge changes to the terms on which passengers can "*pay* for flights with free travel awards." Pet. App. 52a (emphasis added). Although the currency is mileage credits and not dollars, the claims regarding required award levels directly attack the "rates" at which tickets are available.

The Consumer Fraud Act claims are also connected to "services." Respondents allege that American limited the availability of upgrades to first-class service, as well as service on certain blackout days and peak times. They assert a right to enjoy American's services on the terms on which they were available prior to May 18, 1988, when,

respondents allege, they were entitled to redeem frequent flyer miles for "free air travel on any available date to applicable destinations for any available seat in the class of *service* provided." Pet. App. 52a (emphasis added). The claims also expressly refer to "travel and other benefits" respondents seek, *id.* at 49a, 62a, and "travel" is the core service American provides.

Preemption of respondents' Illinois Consumer Fraud Act claims is also supported by the second rationale of *Morales*: the claims relate to rates and services "as an economic matter." 112 S. Ct. at 2039. The claims have a direct connection with the mechanisms through which American conducts its marketing.[5] They also affect American's management of its passenger capacity to provide maximum services at the lowest cost.[6] Because respondents' claims relate to the mix of full-fare and "free" seats American offers its customers, and because any requirement of advance notice of specific changes would directly affect its flexibility to adjust that mix, state restrictions on the form or substance of notice, like the state restrictions on advertising at issue in *Morales*, have "the forbidden significant effect" on rates and services. *Ibid.*[7]

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[5] Respondents acknowledge in their complaints that frequent flyer programs are "a marketing device." Pet. App. 48a-49a, 62a.

[6] See generally *Morales*, 112 S. Ct. at 2039 (describing airlines' management of their passenger capacity in relation to prices at which seats are sold); *Airline Marketing Practices* at 414-415; Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 Yale J. on Reg. 393, 414-415 (1987) [hereinafter *Airline Competition*].

[7] The close relationship between the conduct challenged under the Illinois Consumer Fraud Act and that addressed by the Texas statute and NAAG guidelines found to be preempted in *Morales* further supports the conclusion that respondents' statutory claims are preempted. Although it was the advertising portions of the guidelines that were at issue in *Morales*, the guidelines also contain detailed provisions relating to frequent flyer programs. See 112 S. Ct. at 2049-2054 (appendix reprinting guidelines). The guidelines instruct airlines regarding language that NAAG considers "non-deceptive" and

The Supreme Court of Illinois plainly erred in holding that respondents' damage claims are not preempted on the ground that a frequent flyer program is not "essential" to the operations of an airline. Pet. App. 6a. The test under *Morales* is not whether the practice at issue is "essential," but whether it "relates" to—*i.e.*, has a "connection with" or makes "reference to"—rates, routes, or services. 112 S. Ct. at 2037. Only state laws that affect the specified airline operations in a "tenuous, remote, or peripheral" manner may coexist with Section 1305(a)(1). *Id.* at 2040. The measure of what is too "tenuous" to be preempted is properly viewed as the other side of the "relating to" coin. The examples referred to in *Morales* of state laws that would have too tenuous or remote an effect on air fares to be preempted were gambling, prostitution, and obscenity laws. *Ibid.* Those examples do not suggest that state laws relating to any aspect of airline operations that may be regarded as less than "essential" are consistent with the ADA.

Moreover, the historical analysis the Supreme Court of Illinois employed in finding frequent flyer programs not to be "essential" to airline operations is especially misplaced in the context of the ADA. The court observed that "the airline industry functioned successfully for decades prior to providing incentives to its travelers in the form of frequent flyer programs." Pet. App. 6a. Although it is

"consistent with state law" for reservation of airlines' rights to alter their programs, 112 S. Ct. at 2049; similarly here, respondents claim that American, although it "reserved the right to restrict, suspend, or otherwise alter aspects of the Program," Pet. App. 64a, did not sufficiently inform them of the nature of changes American might make. The guidelines also provide detailed transition rules for the institution of capacity controls in a manner NAAG deems fair, 112 S. Ct. at 2050; respondents complain of the manner in which American instituted capacity controls. The Texas law that, in conjunction with the guidelines, created a potential cause of action by private customers in *Morales*—the Texas Deceptive Trade Act—is closely analogous to the statute upon which respondents in this case rely—the Illinois Consumer Fraud Act.

true that airlines did function prior to the institution of frequent flyer and other post-deregulation innovations, it was precisely the airlines' failure to function as successfully as Congress wished that prompted deregulation. In the era of deregulation, "[f]requent flyer programs have been widely acknowledged as the most successful marketing programs in airline industry history." *Morales*, 112 S. Ct. at 2049 (NAAG guidelines).[8] In any event, the purpose of the ADA is to leave largely to the airlines themselves, not to federal and state agencies and courts, the power to decide what marketing mechanisms are appropriate in the furnishing of air transport services.

C. For the foregoing reasons, the judgment of the Supreme Court of Illinois should be reversed insofar as it holds that respondents' claims for damages under the Illinois Consumer Fraud Act are not preempted by 49 U.S.C. App. 1305(a)(1).

II. SECTION 1305(a)(1) DOES NOT ALTOGETHER PREEMPT STATE-LAW CLAIMS FOR BREACH OF CONTRACT

Section 1305(a)(1) provides that no State "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law" relating to the rates, routes, or services of an air carrier. The focus of Section 1305(a)(1) is on preventing the States from enacting or enforcing normative policy choices touching on airlines' rate, route, or service offerings. Section 1305(a)(1) does not in terms refer to private contracts or suits for breach of a contract voluntarily entered into by a carrier. The preemption provision describes activities most naturally associated with the exercise of state power, not with the resolution of private contract disputes. It is thus best read not to displace (or to prevent the

[8] *See* Levine, *Airline Competition*, 4 Yale J. on Reg. at 414 (stating that "virtually every carrier of any size" has adopted a frequent flyer program, and that such programs "have assumed an unexpected importance in deregulated airline competition").

effectuation of) competitive, market-driven choices embodied in private contracts. To the extent that respondents' common-law claims for breach of contract are based on allegations of an agreement actually entered into by respondents and American, as distinguished from state laws or policies external to any agreement, Section 1305(a)(1) leaves those claims intact.

A. In a number of respects, the text of Section 1305(a)(1) indicates that it was not intended to bar state courts altogether from entertaining state common-law actions based on alleged breaches by airlines of their contracts with passengers. Section 1305(a)(1) provides that no State "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law" that relates to rates, routes, or services of an air carrier. The series of words—"law, rule, regulation, standard, or other provision"—connotes official, government-imposed policies, not the terms of a private contract agreed to by the parties. That understanding is reinforced by the phrase "having the force and effect of law," which generally refers to binding standards of conduct that operate irrespective of any private agreement. So, too, the import of the directive that no State may "enact or enforce" such a provision "relating to rates, routes, or services" is that States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.

The conclusion that the ADA was not intended to prevent state courts from entertaining breach-of-contract suits is reinforced by the savings clause in 49 U.S.C. App. 1506, which was enacted in 1958, see Pub. L. No. 85-726, § 1106, 72 Stat. 798, and was not repealed by the ADA. The savings clause expressly preserves "the remedies now existing at common law or by statute." When read in conjunction with the savings clause, Section 1305(a)(1) bars a State from adopting or enforcing its own substantive standards with respect to rates, routes, or services, but not from making available the customary

"remedies" to a party claiming that an airline has breached terms to which it voluntarily agreed by entering into a contract with a customer.[9]

To be sure, the States are without authority under Section 1305(a)(1) to "enforce" as well as to "enact" laws, rules, regulations, standards, and other provisions having the force and effect of law. That language could perhaps be read to preempt even state-court enforcement of private contracts. It is most consistent with the purposes of the ADA and the practical demands of deregulation, however, to read the ban on enforcement to refer only to imposition of the States' own legal standards, rather than effectuation of terms agreed to by private parties. The ADA's reference to "enforce[ment]" is readily susceptible of such a reading. Section 1305(a)(1) deprives the States of the authority to "enforce" as well as "enact" laws in order to make clear that future as well as existing laws are covered. The requirement that States not "enforce" laws with respect to specified subjects also reinforces the conclusion that even those state laws or provisions that do not themselves prescribe "rates, routes, or services" must not be enforced in such a manner as to affect them. *Cf. Morales*, 112 S. Ct. at 2037-2038. Thus, although we believe that state-law breach-of-contract claims are not altogether preempted, if state laws, standards, or policies are invoked in a breach-of-contract action to invalidate or limit contract terms agreed to by the parties, or to impose a "construction" on those terms that departs from the parties' agreement, such "enforce[ment]" would run afoul of Section 1305(a)(1) and *Morales*. See pages 29-30, *infra*.

[9] As the Court held in *Morales*, Section 1305(a)(1), where it applies, trumps the savings clause in 49 U.S.C. 1506; the savings clause therefore did not permit a state attorney general from enforcing standards, imposed by state law, against an air carrier. 112 S. Ct. at 2037. *Morales* does not, however, render the savings clause's preservation of "remedies" irrelevant to the question whether Section 1305(a)(1) should be construed to reach private contract claims in the first place.

Moreover, in contrast to the close parallel between the use of "relate to" in ERISA and "relating to" in Section 1305(a)(1) that the Court relied upon in *Morales*, the two statutes' preemption provisions differ with respect to the types of state law covered. ERISA, unlike the ADA, provides that it "shall supersede" all state law, and that the state law affected expressly includes "decisions." See 29 U.S.C. 1144(a) and (c)(1); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139 (1990).[10] Section 1305(a)(1), in contrast, does not "supersede" the entire corpus of state-law principles, but instead prohibits States from "enact[ing] or enforc[ing]" certain laws and other provisions having the force and effect of laws. And it does not in terms prohibit "orders" or "decisions" in which courts do nothing more than effectuate private parties' contract terms.[11]

B. Just as the Court must "give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme," *California* v. *Federal Energy Regulatory Commission*, 495 U.S. 490, 497 (1990), it should consider the express references elsewhere in the FAA to contracts and agreements as evidence that Congress did not intend to preempt all contract claims. Section 1381(b), 49 U.S.C. App. 1381(b), shows that Congress presupposed the continued vitality of individual contracts—and therefore of at least certain claims alleging breach of such contracts. That Section

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[10] See also *CSX Transportation, Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1737 (1993) (quoting statutory reference to preempted state law that includes "orders"); cf. *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129-130 (1991) (laws giving effect to contracts preempted by provision making consolidating rail carriers "exempt" from "all" laws as necessary to accomplish consolidation).

[11] Compare Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. 1715z-17(d), 1715z-18(e) (expressly preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. 301(a) (preempting rights "under the common law or statute of any state").

refers to the "contract of carriage," which is the standard contract for an airline trip. Section 1381(b) authorizes air carriers to "incorporate by reference in any ticket or other written instrument any of the terms of the contract of carriage" to the extent authorized by DOT. DOT regulations similarly refer expressly to "contract[s]" in requiring carriers to give passengers notice of "[r]ights of the carrier to change terms of the contract." 14 C.F.R. 253.5(b)(3). They also specify that carriers must give passengers conspicuous written notice of "time periods within which passengers must file a claim or bring an action against the carrier for its acts or omissions or those of its agents." 14 C.F.R. 253.5(b)(2). The preamble to that regulation makes clear that DOT regarded passengers to be free to file state-law contract claims: DOT explained that although the regulation "takes a Federal approach to the structure of the contract notice that must be provided," DOT recognized that "[w]ith the end of domestic tariffs on January 1, 1983, the airlines would be subject to the *contract law of the States* in issuing ticket contracts." 47 Fed. Reg. 52,129, 52,130 (1982) (emphasis added). A holding that all private contract claims are preempted would eliminate the option for consumers to seek compensation under state law in appropriate circumstances.

Section 1371(q)(2), 49 U.S.C. App. 1371(q)(2), regarding "Insurance and liability," also implies a role under the ADA for judicial resolution of contract disputes. That Section authorizes DOT to demand that any carrier file "a performance bond or equivalent security arrangement." Such bonds are conditioned on the airlines' "making appropriate compensation" to travelers for failure "to perform air transportation services in accordance with agreements therefor." *Ibid.* The Act thus contemplates that the airlines' own "agreements" with passengers—*i.e.*, their contracts—will identify the services the airlines furnish, and therefore form the basis for calculating the

appropriate level of compensation for a breach of the duties the airlines assumed.[12]

C. In determining the precise scope of preemption, this Court typically refers to "the purposes of the pre-emption provision, and the regulatory focus of [the statute] as a whole." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 19 (1987). The central purpose of Section 1305(a)(1) is to prevent state economic regulation relating to rates, routes, or services. The reasons for preventing such regulation do not, however, extend to the contractual terms agreed upon by the parties themselves. No committee or conference report, floor statement, or bill at any time suggested that all claims to effectuate contract terms would be preempted under Section 1305(a)(1).[13] The state laws, rules and regulations cited disapprovingly in the legislative history were state enactments or applications of normative standards, including disallowances of rate increases, and other state fare regulation.[14]

[12] It is also unlikely that Section 1305(a)(1) preempts safety-related personal-injury claims relating to airline operations. See 49 U.S.C. App. 1371(q)(1) (requirements for a carrier to have insurance for amounts for which the carrier "may become liable" for personal injuries and property losses "resulting from the operation or maintenance of aircraft"); see, *e.g.*, *Hodges* v. *Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993). As the Fifth Circuit explained in *Hodges*, "[i]f liability for personal injuries were preempted," DOT regulations requiring airlines to carry insurance covering such injuries "would hardly be necessary, because there is no federal compensation scheme for injuries to airline passengers." *Id.* at 355. The *Hodges* court held that the tort claim before it was preempted only because the panel was bound by a previous unpublished decision extending preemption to personal injury claims; the court has since agreed to review the case *en banc*. See 12 F.3d 426 (1994).

[13] See H.R. Conf. Rep. No. 1779, 95th Cong., 2d Sess. (1978); H.R. Rep. No. 1211, 95th Cong., 2d Sess. (1978); S. Rep. No. 631, 95th Cong., 2d Sess. (1978); see, *e.g.*, 124 Cong. Rec. 30,663 (1978) (remarks of Rep. Fascell); *id.* at 10,688 (remarks of Sen. Cranston).

[14] For example, the Senate Report referred to the preemption provision as an effort to "rationalize a confusing system of dual regulation of federally certificated air carriers that has evolved in some States." S. Rep. No. 631, *supra*, at 98. The Report explained that "recently several States have involved themselves in regulating the services of interstate airlines between points within their State. For example, the State of Pennsylvania has, in recent years, disallowed fare increases between Pittsburgh and Philadelphia which were authorized by the Civil Aeronautics Board. Additionally, the State of California regulates the interstate fares of CAB-certificated air carriers, even in markets where the CAB carrier has a monopoly and, therefore, should be subject to the CAB price policies." *Ibid.*

Private contract claims are of a different order. When the terms of a contract are purely voluntary and of the parties' own making, their enforcement will not result in the substitution of state law or policy for the airlines' business judgments about how the airlines should be run. "[A] common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . imposed under State law.'" *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2622 (1992) (plurality opinion) (emphasis omitted). Where a State affords a common-law remedy for breach of such a commitment, "[t]he level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations." *Id.* at 2628 (Blackmun, J., joined by Kennedy & Souter, JJ., concurring in part, concurring in the judgment in part, and dissenting in part). The common law of contract that state courts may apply consistent with Section 1305(a)(1) "does not define the terms of the relationship between [the parties]," *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987), but instead only declares that a breach of the agreed-upon terms may entitle the non-breaching party to a remedy. Hence, where contracts are concerned, if an airline's experience proves that particular terms are unprofitable or burdensome, the airline is free not to agree to such terms in the future.

D. The conclusion that the ADA does not entirely preempt state-law contract claims is further reinforced by the consequences of such a construction. Three equally untenable results are possible.

One possibility is that DOT would be solely responsible for adjudicating all complaints of breach of contract. The ADA did not, however, create any administrative apparatus for DOT adjudication of private contract disputes. Even assuming that DOT has the power to create such a mechanism, see, *e.g.*, 49 U.S.C. App. 1324(a) (granting DOT powers necessary to carry out the provisions of the FAA), to do so would be contrary to the ADA's basic deregulatory thrust. Prior to deregulation, rates, routes, and services had been set by the CAB through a cumbersome administrative process of applications and approvals. Pub. L. No. 85-726, 72 Stat. 731 (1958). Through deregulation, Congress sought not to create a new, extensive bureaucracy, but to place less reliance on regulatory decisions in favor of a market mechanism operating by way of private decisions.[15] It is, in our view, inconceivable that Congress intended routine breach-of-contract cases to be preempted in favor of a federal administrative regime to resolve all contract-based claims by customers against airlines.

A second possible, but equally untenable, result of preemption of all contract claims is wholesale elimination of the enforceability of contracts in any forum. Under such an interpretation, federal preemption would simply render null and void—or at least unenforceable—any contract touching on airline "rates, routes, or services," as those terms were broadly interpreted in *Morales*. Such

[15] H.R. Conf. Rep. No. 1779, *supra*, at 53 (describing purpose of the ADA "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services"); DOT Order Denying Rulemaking (Pet. App. 85a, 101a) (referring to "Congress' decision that the public will benefit if airline fares and services are determined by market forces rather than government regulation").

a principle would invalidate passengers' claims (such as those for "bumping," or lost or damaged baggage) that service was not provided as promised, and might by the same token eliminate airlines' own contract-based claims that a passenger failed to make payment, or illegally transferred a ticket. See, *e.g.*, *American Airlines* v. *Christensen*, 967 F.2d 410 (10th Cir. 1992). Such a result could not be squared with a statute designed to place maximum reliance on market forces, which ordinarily could not operate absent a mechanism by which parties may be held accountable for their contracts. The stability and efficiency of the market depend fundamentally on the enforceability of agreements freely made, based on needs perceived by the contracting parties at the time. The absence of any indication in the legislative history that Congress intended to eliminate all common-law contract remedies makes this alternative particularly implausible. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured," *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984), by breaches of contract.

A third possible outcome would be to shift contract claims relating to rates, routes, or services to the federal courts, to be resolved under a judicially fashioned federal common law. That result, which would redirect potentially countless minor contract disputes into federal court, is also unsupported by the ADA. There is no indication in the ADA's text, history or purpose that Congress believed that adjudication of such claims under state common law was anti-competitive or burdensomely non-uniform, and that the courts should instead fashion federal common law applicable to airline-related contract claims. Unlike ERISA, which created extensive federal civil claims procedures, see 29 U.S.C. 1132(a)(3) and (e),[16] the ADA

[16] See *Ingersoll-Rand*, 498 U.S. at 143-145 (finding ERISA's comprehensive and detailed civil enforcement mechanism to be a "special feature" supporting preemption of common-law wrongful discharge

does not establish such procedures or otherwise suggest that contract claims be adjudicated under federal law. The judiciary has hesitated to formulate a body of federal common law without clear expression of congressional intent to do so, particularly where disputes involve only private parties.[17]

The large numbers of contract claims potentially relating to "rates, routes, or services" makes it implausible that Congress would have preempted those claims without so much as mentioning them. For example, there were 50,840 cases of involuntarily denied boarding in 1993 alone. While the vast majority of those passengers accepted the denied-boarding compensation provided by DOT's rule, each passenger could have pursued a claim in state court in conformity with the same rule. Each year the airlines also receive several million complaints concerning lost, damaged or delayed baggage, most of which are resolved informally. However, certain kinds of contract claims relating to air travel are routinely adjudicated in state courts.[18] Elimination of state courts as a forum for

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claims); *Pilot Life*, 481 U.S. at 54 (referring to the "detailed," "comprehensive" and "carefully integrated" civil enforcement scheme providing for "prompt and fair claims settlement").

[17] See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 643-644 (1981) (finding no "unmistakably clear" expression of congressional intent to create a federal common-law right of contribution from co-conspirators with respect to treble-damages antitrust action). If Congress had identified non-uniformity of *contract* principles as a distinct barrier to airline competition, there might be greater reason for the courts to develop uniform federal common-law principles for contract enforcement. Cf. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989) (declaring that "courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans'" (quoting *Pilot Life*, 481 U.S. at 56)).

[18] See, *e.g.*, *Cantor* v. *Piedmont Aviation, Inc.*, 474 A.2d 839 (D.C. App. 1984) (applying contract liability limits to lost-luggage claim); *Wackenhut Corp.* v. *Lippert*, 609 So. 2d 1304 (Fla. 1992) (applying contract liability limits to claim for value of hand baggage lost at security checkpoint), cert. denied, 113 S. Ct. 2996 (1993); *Crites* v. *Delta Air Lines, Inc.*, 341 S.E.2d 264, 266 (Ga. Ct. App. 1986) (noting in

disposition of routine contract claims would be fundamentally at odds with the ADA.

E. The administrative implementation of the ADA by the CAB and DOT also reinforces the conclusion that common-law contract claims are not altogether preempted by Section 1305(a)(1). Federal regulations governing "bumping" of passengers from overbooked flights envision that passengers may sue in state court to recover damages for breach of their contracts of carriage.[19] The regulations provide that a passenger who is involuntarily bumped may accept compensation offered by the airline, or "may decline the payment and seek to recover damages in a court of law or in some other manner." 14 C.F.R. 250.9(b).[20]

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contract case that "Georgia has long recognized that a ticket holder has a right of action for the breach of a contract of carriage"); *Chow* v. *Trans World Airlines, Inc.*, 544 N.E.2d 548 (Ind. Ct. App. 1989) (granting promissory estoppel recovery based on airline's promises to arrange connecting flight); *Ravreby* v. *United Airlines, Inc.*, 293 N.W.2d 260, 266 (Iowa 1980) (holding that no contract duty to protect nonsmokers from smoke discomfort arises from airline's policy of segregating smoking and nonsmoking passengers); *Vick* v. *National Airlines, Inc.*, 409 So. 2d 383 (La. Ct. App. 1982) (finding breach of contract where airline failed to notify passengers of unscheduled stop); *Mathews* v. *Northwest Airlines, Inc.*, 536 N.Y.S.2d 338 (App. Div. 1988) (denying recovery under contract for refund for flight missed due to illness); *Slentz* v. *American Airlines, Inc.*, 817 S.W.2d 366 (Tex. Ct. App. 1991) (refusing to find contract-based warranty of safe carriage covering injury to passenger in airport). We do not necessarily endorse the claims or results in these cases.

[19] See *Nader*, 426 U.S. at 294-295. The Court stated in *Nader* that, under the federal regulations, "[p]assengers are free to reject the compensation offered in favor of a common-law suit for damages suffered as a result of the bumping." *Ibid.* The Court observed that "[t]he contemplation that common-law remedies will continue to exist is in conformance with longstanding [CAB] policy," and that the CAB "specifically rejected the carriers' proposal that the denied boarding compensation be made an exclusive remedy." *Id.* at 307 n.18.

[20] See 14 C.F.R. 250.9(b) (declaring, under "Method of Payment" in text of required statement to passengers, that "[t]he passenger may * * * refuse all compensation and bring private legal action"). The bumping regulations were referred to with approval in the CAB

DOT has officially noted that frequent flyer programs are governed by both contract law and 49 U.S.C. App. 1381.[21] DOT has taken the position that contract claims arising out of frequent flyer contracts generally are not preempted. DOT's own consumer literature specifies that dissatisfied consumers unable informally to resolve complaints against airlines regarding frequent flyer programs "may wish to consider legal action through the appropriate

Statements of General Policy implementing Section 1305. 44 Fed. Reg. 9948, 9950 (1979); see also 47 Fed. Reg. 52,982 (1982) ("[i]n the exceptional case where the regulatory DBC payment is not adequate compensation, the passenger is free to refuse it and bring private legal action"); *id.* at 52,983 (involuntarily bumped passengers "will still, of course, be free in these situations to take action against carriers in situations where they feel it is justified").

[21] See DOT Order Denying Rulemaking (Pet. App. 96a & n.17) (referring to airline position that "correctly describes the relationship between frequent flyer programs and their members as a contract in which the carrier offers to provide benefits subject to the program's terms and conditions and the participant accepts the offer by joining the program and flying on the carrier," but explaining that the carrier-passenger relationship is not "governed solely by contract law," because Section 1381 also applies); DOT Order 89-9-25, *Complaints of American Association of Discount Travel Brokers to American Airlines Passenger Tariffs, CAB Nos. 465 and 409*, at 2 (Sept. 13, 1989) (characterizing frequent flyer program terms as "a matter of private contract" between passengers and airlines).

American in its certiorari petition contends that DOT has already "plainly indicated" in its Order Denying Rulemaking that Section 1305(a)(1) would preempt contract claims relating to frequent flyer program changes (Pet. 28), but that is not the case. There DOT stated, consistent with its position here, that contract law "cannot authorize a determination of whether individual terms and conditions of a carrier's program are fair and reasonable." Pet. App. 102a. That is so because (1) contract law is not concerned with assessing the fairness and reasonableness of policies, but rather with effectuating parties' agreements, and (2) to the extent that a state court does attempt to carry out "state regulation" through its contract law, it would be preempted.

civil court."[22] The DOT regulation governing lost, delayed or damaged baggage also refers to "baggage liability to passengers," and plainly contemplates that passengers may bring legal action. See 14 C.F.R. Pt. 254.

F. One function served by Section 1305(a)(1) is to protect competition among interstate carriers from the added burdens that would result from the potential imposition of *non-uniform* state standards. State-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide presents a significantly reduced risk of such non-uniformity, and as noted above (see page 20, *supra*), the legislative history does not identify any such risk with respect to claims based on private contracts as a concern leading to the enactment of Section 1305(a)(1).[23] To be sure, different courts adjudicating a claim for breach of a contract of carriage or a frequent flyer contract might be called upon to apply background principles of state contract law and might reach different results. But contract law is not, at its core, "diverse, nonuniform, and confusing," *Cipollone*, 112 S. Ct. at 2624 (plurality opinion), because it universally rests on the parties' voluntary agreement to a specified exchange. A contract is simply "[a]n agreement between two * * * persons which creates an obligation." *Black's Law Dictionary* 322 (6th ed. 1990).[24] And contract principles are relied upon each

[22] See United States Dep't of Transportation, *Plane Talk: Facts for Air Travelers From the Consumer Affairs Office* 2 (1992).

[23] DOT has recognized that "[u]sually, businesses operating in several jurisdictions are able to utilize uniform contracts by complying with the most restrictive State law." 47 Fed. Reg. 5235 (1982).

[24] Cf. *Nader*, 426 U.S. at 304 (determining that "considerations of uniformity in regulation" did not require reference of common-law claims to the CAB under principles of primary jurisdiction). With the enactment of Section 1305(a)(1) subsequent to *Nader*, together with Congress's expressed intent to achieve regulatory uniformity (See H.R. Rep. No. 793, 98th Cong., 2d Sess. 4 (1984)), however, we believe that principles of primary jurisdiction might appropriately play a more

day by countless interstate businesses without apparent anti-competitive effects of the sort the ADA was enacted to overcome. Some state-law principles of contract law (such as the doctrine of unconscionability) might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties. See pages 16, 17-18, *supra*, and 29-30, *infra*. But we do not believe that any such limitations on state-court adjudication of contract claims in particular cases require the complete preemption of all state-law contract claims.

G. This case is before the Court on review of the Illinois Supreme Court's decision affirming the trial court's denial of American's motion to dismiss the complaints on preemption grounds. Because state-law breach-of-contract claims are not categorically preempted by Section 1305(a)(1), we cannot say at this stage of the proceedings that the trial court erred, even though we do not embrace the reasoning of the Illinois courts in addressing the preemption issue. In the course of further proceedings on remand, however, it may well develop that respondents' claims, although cast in breach-of-contract terms, would properly be held to be preempted, in whole or in part.

It is unclear, for example, to what extent (if at all) the Supreme Court of Illinois may have relied on the Consumer Fraud Act (or comparable common-law principles) in evaluating the implications under contract law of American's reservation of rights to change its frequent flyer program. Respondents' contract claims would presumably not be preempted if, for example, American had not made the disputed changes, but simply refused to grant travel awards to passengers who accumulated the requisite miles and otherwise met program conditions. The impact of American's reservation of rights to change its program on the preemption analysis is, however, less

significant role under the ADA than they did under the pre-ADA regime.

clear.[25] The court did not separately consider whether any determination that American's reservation of rights was inadequate to defend it against a claim of breach of contract would depend on the Consumer Fraud Act standard of adequate notice, or whether traditional common-law contract principles would independently yield the same result. The Supreme Court of Illinois instead treated the contract and Consumer Fraud Act claims as identical for preemption purposes, and found both non-preempted on the erroneous rationale that frequent flyer programs are not "essential" to airline operations. Pet. App. 6a.

The core contract law that we believe is not preempted is the body of contract principles upon which States traditionally rely to enforce agreements actually entered into between parties and to remedy the breach of such agreements. Section 1305(a)(1) does, however, prohibit a State from interpreting and applying its state law of contracts to impose its own substantive policy choices on airlines, and thereby to achieve the functional equivalent of the regulation the ADA expressly prohibits. Invocation of state common-law principles to interpret contracts in light of public policy, such as policy derived from state legislation, see generally 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 5.5, at 53 (1990), may fundamentally alter the parties' agreement in order to further state policy goals external thereto, and thereby amount to impermissible enforcement of state standards under Section 1305(a)(1). Likewise, application of certain state common-law principles or the granting of certain relief may also be preempted by Section 1305(a)(1) to the extent they would result in a failure to effectuate the agreement as written or directly affect rates and services.

[25] The extent, if any, to which American expressly promised each of the frequent flyer program benefits that respondents claim is also unclear.

Because the interpretation of Illinois law is primarily within the province of the state courts, and because this case is at the most preliminary stages in the trial court, there is no occasion here to analyze further the extent to which respondents' contract claims may turn upon state policies that are independent of the intent of the parties or are not part of the traditional common law applicable to contracts, and may therefore be preempted. The judgment of the Supreme Court of Illinois should be reversed insofar as it addresses respondents' contract claims, and the case should be remanded for further proceedings on those claims.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed, and the case should be remanded for further proceedings on respondents' contract claims.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

STEPHEN H. KAPLAN
General Counsel

ROBERT V. ZENER
JONATHAN R. SIEGEL
Attorneys

PAUL M. GEIER
Assistant General Counsel for Litigation

SAMUEL PODBERESKY
Assistant General Counsel for Aviation Enforcement and Proceedings
Department of Transportation

JUNE 1994

☆ U.S. GOVERNMENT PRINTING OFFICE 1994—301-157/88159